INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Alabama Power Co. v. *Ickes*, 302 U. S. 464	8
American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401	4
Chicago & Southern Air Lines, Inc., v. *Waterman Steamship Corp.*, 333 U. S. 103	8
United States v. *Agne*, 161 F. 2d 331	4
Statutes:	
Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq:*	
Sec. 4	8
Sec. 5	8
Sec. 10	2, 8, 9, 14
Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C., 1946 ed. and Supp. II, 401, *et seq.*:	
Sec. 303	2, 6, 11
Sec. 308	2, 11
Sec. 309	2, 12
Sec. 601(c)	2, 7, 12
Sec. 1006(a)	2, 5, 13
Title II	5
Title III	5
Title IV	5
Title VI	5
Federal Airport Act, 60 Stat. 170, 49 U.S.C. 1101, *et seq.*:	2
Sec. 3(a)	6
Sec. 8	4
Sec. 9(c)	6
Sec. 9(e)	3, 4, 7
5 U.S.C. 133	5
Miscellaneous:	
83 Cong. Rec. 6407, 6879, 8866	5, 6
H. Doc. Nos. 681 and 692, 76th Cong., 3rd Sess.	5
H. Rep. No. 1980, 79th Cong., 2d Sess.	9
President's Reorganization Plans Nos. III and IV, 54 Stat. 1231, 1234	5
Rhyne, *Civil Aeronautics Act Annotated*, pp. 73, 74	5

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 186

CITY OF DALLAS, PETITIONER

v.

D. W. RENTZEL, CIVIL AERONAUTICS ADMINISTRATOR, DEPARTMENT OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 246) is reported in 172 F. 2d 122. The orders of the Administrator of Civil Aeronautics (R. 20, 25) are not officially reported.

JURISDICTION

The judgment of the court below was entered on February 1, 1949 (R. 249), and a timely petition for rehearing (*ibid.*) was denied on April 14, 1949 (R. 256). The petition for a writ of certiorari was filed on July 12, 1949. The jurisdiction of the Court is invoked under Title 28, United States Code, Section 1254.

QUESTION PRESENTED

Whether a decision by the Administrator of Civil Aeronautics with respect to the grant of federal aid funds under the Federal Airport Act is judicially reviewable in an original proceeding in a United States Court of Appeals.

STATUTES INVOLVED

The Federal Airport Act (60 Stat. 170, 49 U.S.C. 1101 *et seq.*) is set forth in full in the record (R. 72). Sections 303, 308, 309, 601(c), and 1006(a) of the Civil Aeronautics Act of 1938 (52 Stat. 973, as amended, 49 U.S.C. 453, 458, 459, 551(c), 646(a)) and Section 10 of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. 1009) are set forth in pertinent part in the Appendix, *infra,* pp. 10-13.

STATEMENT

Petitioner commenced this proceeding on September 15, 1948 by filing in the court below a petition for review (R. 1) of two orders (R. 20, 25) issued by the Administrator of Civil Aeronautics under the Federal Airport Act (60 Stat. 170, 49 U.S.C.1101 *et seq.*) The Court of Appeals dismissed the petition for want of jurisdiction (R. 246-248).

The challenged orders rejected petitioner's objections to a proposed grant of federal funds for the development of an airport at Fort Worth, Texas. The City of Fort Worth had filed an application (R. 29) for a grant under the Federal Airport Act, which empowers the Administrator to

make such grants "in order to bring about . . . the establishment of a Nation-wide system of public airports adequate to meet the present and future needs of civil aeronautics . . ." (R. 75). The City of Dallas, petitioner here, filed a memorandum in opposition (R. 151) to the proposed grant and requested a public hearing pursuant to Section 9(e) [1] of the Act. Public hearings were held (R. 20) at which petitioner presented its views but, it asserts (Pet. 2, 23), was not permitted to cross-examine witnesses. The Administrator rejected the objections of petitioner to the proposed project (R. 20) and on motion for rehearing adhered to his rejection (R. 25).[2] It is these orders which petitioner unsuccessfully sought to have reviewed in the court below.

ARGUMENT

The court below properly held that it was without jurisdiction to entertain this proceeding. A petition to review an administrative determination is

---

[1] Section 9(e): "Project applications shall be matters of public record in the office of the Administrator. Any public agency, person, association, firm, or corporation having a substantial interest in the disposition of any application by the Administrator may file with the Administrator a memorandum in support of or in opposition to such application; and any such agency, person, association, firm, or corporation shall be accorded, upon request, a public hearing with respect to the location of any airport the development of which is proposed." (R. 80.)

[2] Immediately after the final disposition of petitioner's objections the Administrator offered a grant-in-aid to Fort Worth for the proposed airport development (R. 39) and Fort Worth accepted the grant (R. 43).

an original suit. The Court of Appeals has no original jurisdiction except that specifically conferred upon it by statute (*American Federation of Labor* v. *National Labor Relations Board,* 308 U.S. 401; *United States* v. *Agne,* 161 F. 2d 331 (C.A. 3)) and no statute confers jurisdiction here.

Petitioner relies upon the provisions of three statutes to sustain its contention that the Court of Appeals has jurisdiction of this proceeding: the Federal Airport Act, the Civil Aeronautics Act of 1938, as amended, and the Administrative Procedure Act.

1. The Federal Airport Act, under which the challenged orders were issued, contains no provision for judicial review whatsoever.[3] The Act delegated to the Administrator, subject to appropriate standards, the function of granting federal financial aid for the development of civil airports. His determinations are final except that with respect to larger airports,[4] as provided in Section 8 of the Act (R. 78-79), proposed projects are subject

---

[3] Petitioner argues (Pet. 13) that the requirement in Section 9(e) of the Act for a public hearing of objections to a proposed project implies a right of review in a court of appeals of the decision reached by the Administrator. Clearly this is a *non sequitur*. The specific statutory requirement that certain procedures be followed in gathering information to aid in formulating a policy decision scarcely implies that the policy decision, when made, will be subject to review procedures not prescribed by statute.

[4] Class 4 and above; the Fort Worth airport is to be a Class 5 airport (R. 21).

to what amounts to a congressional veto expressed by law or by concurrent resolution.

2. The Civil Aeronautics Act of 1938 is of no greater aid to petitioner. Section 1006(a)[5] is the only provision cited which confers jurisdiction on the courts of appeals. That section, as the court below held (R. 247), is limited by its terms to orders "issued by the Authority (Board)". Moreover, it is limited to orders issued "under this [Civil Aeronautics] Act". The orders sought to be reviewed were issued under the Federal Airport Act, not under the Civil Aeronautics Act; they were issued by the Administrator of Civil Aeronautics and not by the Civil Aeronautics Board.[6] The Administrator is an official exercising authority, independently of the Board, under the Civil Aeronautics Act and other statutes, including the Federal Airport Act. The quasi-judicial functions relating to civil aeronautics were conferred on the Board [7] and the exer-

[5] "(a) Any order, affirmative or negative, issued by the Authority (Board) under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals . . ." (R. 247)

[6] The Board was formerly called the "Civil Aeronautics Authority". See President's Reorganization Plans Nos. III and IV, 54 Stat. 1231, 1234, effective June 30, 1940; House Doc. Nos. 681 and 692, 76th Congress, 3rd Session; 5 U.S.C. 133.

[7] Compare Title III of the Civil Aeronautics Act, prescribing the powers and duties of the Administrator, with Titles II, IV, and VI which set forth the general authority of the Board. See, also, statements of Congressman Lea with respect to this separation of functions under the Act, 83 Cong. Rec. 6407, 8866; *Rhyne, Civil Aeronautics Act Annotated*, pp. 73, 74.

cise of these functions only was made subject to review by the courts.

The other sections of the Civil Aeronautics Act cited by petitioner are irrelevant. Section 303 (49 U.S.C. 453, *infra,* p. 10) prohibits expenditure of funds by other governmental agencies for airport construction without certification by the Administrator, after consultation with the Board, that the project is reasonably necessary for air commerce. Its purpose was to prevent the expenditure of federal funds on unnecessary public works projects.[8] It would seem to be inapplicable to the administration of the Federal Airport Act, which puts expenditures for airports under the direct supervision of the Administrator and requires consultation by the Administrator with the Civil Aeronautics Board (and other agencies) only to the extent feasible (Sections 3(a), 9(c), R. 74-75, 80). But assuming, *arguendo,* that Section 303 is applicable, it is of no aid to petitioner. The section requires the Administrator to consult with the Board before certifying an airport as necessary. There is no requirement that the Board participate in any way in reaching a decision or that the Administrator follow any advice he might receive in the course of this consultation. There is certainly no suggestion that the decision reached should be considered a decision of the Board for

[8] See question by Senator LaFollette and reply of Senator McCarran with respect to the meaning of this section, 83 Cong. Rec. 6879.

the purpose of conferring jurisdiction on the courts of appeals as petitioner seems to suggest. In any event, the case at bar does not involve review of a certification.

Similarly, Section 601 (c) of the Civil Aeronautics Act, 49 U.S.C., Supp. II, 551 (c) (Appendix, *infra*, pp. 11-12) does not support the petitioner's contention that the Court of Appeals has jurisdiction to review the Administrator's orders. That section simply authorizes the Civil Aeronautics Board to delegate to the Administrator rule making and investigating powers with respect to air safety, and to provide for review by the Board of the Administrator's exercise of such delegated powers. Nothing in Section 601 (c) relates either to the question of judicial review or to the Administrator's wholly independent powers under the Federal Airport Act.

Thus, even assuming that the Administrator's orders under the Federal Airport Act are subject to judicial review,[9] it is clear that nothing in the substantive legislation discussed above confers

[9] The court below found it unnecessary to determine whether the Administrator's orders here involved were subject to review in any court. However, it seems entirely clear that Congress, in establishing a Federal grant-in-aid program for the construction of airports, never intended that the Administrator's decisions as to the grant or denial of Federal financial assistance should be reviewable by the courts. Not only is the Federal Airport Act silent as to review, but generally the Federal government's lending and grant-in-aid programs have not been regarded as creating legal rights in particular persons

original jurisdiction to review such orders upon the Court of Appeals.

3. Finally, petitioner contends that Section 10 of the Administrative Procedure Act confers jurisdiction upon the courts of appeals to review the Administrator's actions under the Federal Airport Act. Even if it be assumed that the Act authorizes judicial review in some court,[10] Section 10 (b) of the Administrative Procedure Act provides that "The form of proceeding for judicial review shall

---

which could be enforced in the courts. If the applicant for a loan or grant-in-aid cannot obtain judicial review of its denial, it is most unlikely that a competing interest can challenge in the courts the grant of the application. *Alabama Power Co.* v. *Ickes*, 302 U.S. 464.

Actually, the Federal Airport Act is a perfect example of legislation by which "agency action is by law committed to agency discretion," within the meaning of Section 10 of the Administrative Procedure Act, and which, because it creates no legal rights under the statute, gives rise to no justiciable issues. Similarly, because of the broad and sometimes conflicting considerations of air commerce and national defense which the Administrator must take into account, it is evident that his determinations as to where airports shall be developed with federal financial assistance are not of the type susceptible of judicial review. See *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103.

Finally, even if the hearing requirement of Section 9 (e) of the Federal Airport Act (R. 80) is regarded as giving to petitioner a procedural right which the courts should protect, it is clear that the "public hearing" which must be accorded is simply an opportunity for the expression of views, without the right of cross-examination, as in the case of legislative committee hearings, since the Act does not require the Administrator to act upon the basis of evidence adduced in such hearings. Cf. Sections 4 and 5 of the Administrative Procedure Act, 5 U.S.C. 1003, 1004.

[10] A most improbable assumption. See note 9, *supra*.

be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action * * * in any court of competent jurisdiction." The clear purpose of this provision not to change existing rules of venue and jurisdiction was made doubly clear by the statement of the House Committee on the Judiciary that, "The section does not alter venue provisions under existing law, whether in connection with specially provided statutory review or the so-called nonstatutory or common-law-action variety." H. Rep. 1980, 79th Cong., 2d Sess., 42. Therefore, since no other statute has specifically authorized review of the Administrator's actions under the Federal Airport Act by a court of appeals, Section 10 of the Administrative Procedure Act does not do so either.

CONCLUSION

The decision below is correct and no novel question is presented. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

HERBERT A. BERGSON,
Assistant Attorney General.

WILLIAM D. MCFARLANE,
Special Assistant to the Attorney General.

RICHARD E. ELWELL,
General Counsel.

DENT D. DALBY,
Chief, Enforcement and Litigation Division.

DOUGLAS L. SIEGEL,
Attorney, Civil Aeronautics Administration.

SEPTEMBER 1949.

APPENDIX

The Civil Aeronautics Act of 1938, 52 Stat. 973 as amended, 49 U.S.C., 1946 ed. and Supp. II, 401 *et seq.* provides in part as follows:

> Section 303. No Federal funds, other than those expended under this Act, shall be expended, other than for military purposes (whether or not in cooperation with State or other local governmental agencies), for the acquisition, establishment, construction, alteration, repair, maintenance, or operation of any landing area, or for the acquisition, establishment, construction, maintenance, or operation of air navigation facilities thereon, except upon written recommendation and certification by the Administrator of Civil Aeronautics, made after consultation with the Board, that such landing area, or facility is reasonably necessary for use in air commerce or in the interests of national defense. Any interested person may apply to the Administrator, under regulations prescribed by him, for such recommendation and certification with respect to any landing area or air navigation facility proposed to be established, constructed, altered, repaired, maintained, or operated by, or in the interests of, such person. There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended.
>
> Section 308. The Administrator of Civil Aeronautics shall exercise and perform the powers and duties vested in and imposed

upon him by this Act, and such powers and duties vested in and imposed upon the Board by this Act (except the powers under sections 202, 203, 204 and 206 and the powers and duties under titles IV and VI) as may, from time to time, be assigned to him by the Board; and shall so exercise and perform his powers and duties as best to effectuate the policies declared in, and the purposes of, this Act. The Board may request the Administrator to make reports to it of his work under this Act.

Section 309 [as added by P. L. 872, 80th Cong., 2d sess.]. In the conduct of any public hearings or investigations authorized by this Act or by the Federal Airport Act, the Administrator or any duly designated examiner shall have the same powers to take evidence, issue subpenas, take depositions, and compel testimony as are vested in members of the Board and its duly designated examiners by section 1004 of this Act. Actions of the Administrator or his examiners in such cases shall be governed by the procedures specified in section 1004, and be enforced in the manner provided therein.

Section 601(c) [as amended by P. L. 872, 80th Cong., 2d sess.]. The Civil Aeronautics Board, subject to such terms, conditions, and limitations as the Board may specify, is empowered to delegate to the Administrator the power or authority to prescribe rules, regulations, and standards under this title and to perform functions authorized

under section 702 of this Act. The Board may modify, suspend, revoke, or terminate such power or authority so delegated by it to the Administrator and may prescribe by rules and regulations such provisions and procedures for review of actions taken by the Administrator under authority delegated hereunder as it may deem necessary and appropriate in the public interest. Except as specifically provided in the rules and regulations of the Board, the filing of a petition for review shall not excuse any person from complying with the action of the Administrator nor operate in any manner to stay the enforcement of such action: *Provided,* That nothing in this subsection shall be construed as amending, modifying, or repealing any provision of the Administrative Procedure Act.

Section 1006(a). Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. 1007, provides in part as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> * * * * *
>
> (c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

☆ U.S. Government Printing Office 1949 836304/174